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IN THE

Supreme Court of the United States

October Term, 1957

No. 831

SPERRY GYROSCOPE COMPANY, Division of Sperry Rand Corporation,

Petitioner,

—v.—

ENGINEERS ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on December 27, 1957.

Citations to Opinions Below

The opinion of the District Court appears below at p. 28 and is reported at 148 F. Supp. 521. The opinion of the Court of Appeals appears at p. 19 and is reported at 41 BNA, LRRM 2272.

Jurisdiction

The judgment of the Court of Appeals was entered on December 27, 1957 (R. 102). Rehearing was denied on January 22, 1958 (R. 118). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

This proceeding, to compel arbitration of an alleged grievance arising under a collective bargaining agreement, was commenced in the District Court for the Southern District of New York by the filing and service of a notice of motion (R. 2) and a petition (R. 3) under the United States Arbitration Act, 9 U. S. C. §§4, 6. The District Court held that it had jurisdiction under the Arbitration Act and ordered arbitration under that statute (R. 84). However, the Court of Appeals declined to hold that jurisdiction lay under the Arbitration Act but held that jurisdiction existed over a plenary action under Section 301(a) of the Labor Management Relations Act, 1947, 29 U. S. C. §185(a), and affirmed the judgment, although no summons had been filed or served, and no trial had been held.

Questions Presented

1. Where the jurisdiction of the District Court has been invoked, under 9 U. S. C. §§4, 6, by service of a notice of motion (without a summons) and of a petition, and the District Court has rendered judgment on the motion without a trial, may the Court of Appeals sustain jurisdiction of the District Court under 29 U. S. C. §185(a)?

2. Is service of a summons required to secure personal jurisdiction over a defendant in a suit commenced under 29 U. S. C. §185(a), and, if it is, was service of process

waived by filing an answering affidavit to a petition accompanying a notice of motion making an application under 9 U. S. C. §§4, 6 (which require no summons for personal jurisdiction) without objecting to the absence of the service of a summons?

3. If service of process was waived in an action under 29 U. S. C. §185(a), did appellant also thereby waive the right to file an answer, to pre-trial procedures and to a trial?

4. In an action under 29 U. S. C. §185(a), may summary judgment be granted compelling arbitration of a written grievance under a collective agreement where that agreement makes processing of the grievance through the contractual grievance machinery a prerequisite to arbitration and where proof, on personal knowledge, has been submitted (a) that upon a withdrawal of the written grievance, subject to ratification, it was orally agreed that, should ratification fail, the normal grievance processing would take place and (b) that the party demanding arbitration failed to comply with this agreement; and where the only proof to the contrary was an implied denial that such an oral agreement was made?

5. Does a District Court have jurisdiction to compel arbitration under 9 U. S. C. §4 where the alleged arbitration clause appears in a collective bargaining agreement?

6. May arbitration be compelled, under either 29 U. S. C. §185(a) or 9 U. S. C. §4, of an issue as to which no grievance has been filed and no demand for arbitration has been made, where the contract under which arbitration has been

directed requires that matters submitted to arbitration first be processed through a grievance machinery created by the contract?

7. May an employer be compelled, under either 29 U. S. C. §185(a) or 9 U. S. C. §4, to arbitrate whether certain wage increases, granted to employees for accepting increased responsibilities, are "on a merit basis only", where the contract provides that "It is distinctly understood and agreed that such merit increases are at the sole discretion of the Employer" and the contract permits arbitration only upon a substantial showing in support of the alleged violation, and the policy statement governing merit increases (which policy statement was authorized by the contract) expressly authorizes merit increases for increased responsibilities?

8. Where the parties had previously litigated the meaning of the arbitration and merit increase clauses in a State court which held that the employer's discretion in granting merit increases was not reviewable and the contractual clauses were thereafter twice renewed without change, despite union requests that the clauses be changed, does the State court decision determine the interpretation of these clauses in a suit under 29 U. S. C. §185(a) or in a proceeding under 9 U. S. C. §4?

Statutes Involved

Federal Arbitration Act, 9 U. S. C. §§1, *et seq.*

§1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

* * * "'commerce,' as herein defined, means commerce among the several States or with foreign na-

tions, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

§4. Failure, etc., to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbi-

tration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Labor-Management Relations Act, 1947, 29 U. S. C. §§141, *et seq.*

§185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing

employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Statement

Petitioner (herein called "Sperry") has a plant in Great Neck, N. Y. in which respondent union (herein called "EA") has for many years represented a bargaining unit of employees. In 1956, Sperry was in process of opening a new plant in Salt Lake City, Utah, which would not be covered by the collective agreement with EA (R. 15). To staff that new plant it offered transfers to certain personnel at Great Neck (R. 15). Of 28 employees who accepted transfers, 12 were to receive the same positions previously held at the same rate of pay, 8 were to receive promotions in classifications with corresponding pay increases, and 8 were assigned greater responsibilities (within their existing classifications) with corresponding pay increases (R. 49-51).

The EA was fearful that the granting of increases to those transferring would as a practical matter reduce the merit increases available for those remaining. (See EA statement quoted at R. 36.) Under the contract the EA could not grieve or arbitrate the denial of a merit increase (R. 37, Ex. p. 29).* In order to apply pressure upon Sperry to grant merit increases to those remaining at Great Neck

* "Ex" refers to the collective agreement which was certified as a separate exhibit by the Clerk of the Court of Appeals.

and in the mistaken notion that everyone who transferred received an increase (R. 4-5), the EA filed a grievance on May 31, 1956, charging that the increases had been granted in violation of the contract because they were based entirely upon the "employee's consent to be transferred" (R. 41).* The only proof adduced in support of the grievance was the erroneous allegation that every employee transferred received an increase (R. 4-5).

The collective agreement provides that increases shall be "on a merit basis only" but it further provides that "It is distinctly understood and agreed that such merit increases are at the sole discretion of the Employer" (Ex. pp. 29-30). The agreement also provides for the continuance of Sperry's "present semi-annual merit review practice", and for the publication by Sperry of the policies governing the merit review (Ex. p. 29). These policy statements have for many years authorized merit increases "to reflect a corresponding change in duties or responsibilities" and no grievance or objection has ever been filed by the EA with respect thereto (R. 75-76).

The same merit increase and arbitration clauses in the present contract have appeared in a series of prior contracts (R. 35), and the parties have bargained concerning the interpretation and interrelation of these clauses. The EA recognized that it could not demand arbitration under the contract without adducing substantial proof in support

* EA also grieved that these increases should not be charged to the guaranteed amount of merit increases of 4.5% of payroll. At the time, this portion of the grievance was premature since it is not until the end of the year that one may determine the significance of any charge. Neither the District Court nor the Court of Appeals mentioned this issue. In fact, it is academic because, excluding these increases, the amount of merit increases exceeded the guarantee.

of its claim that a violation had occurred (R. 25). In 1953 it demanded arbitration with respect to a claim that certain wage increases which Sperry had designated as "merit increases" were not in fact "merit increases" and that Sperry had violated the contractual provision that only merit increases were to be granted. The arbitration demand was stayed in New York Supreme Court upon the ground (1) that the EA had adduced no proof showing the alleged violation and (2) that merit increases are at Sperry's sole discretion and "That discretion is not reviewable" (*Infra*, p. 39).

Upon the expiration of the agreement in force in 1953 and again at the expiration of the following agreement, the EA sought to have the merit increase and arbitration clauses changed (a) so that it would not be required, as a condition of its right to arbitrate, to adduce proof that an increase designated as a "merit increase" was not in fact for merit and (b) to eliminate Sperry's discretion with respect to merit increases (R. 26-35). These demands were rejected by Sperry and the new collective agreements were executed without change on these points. The instant contract, therefore, contains the same merit and arbitration clauses as did the 1950-1954 and 1954-1956 contracts. Each of these contracts has required that all issues submitted to arbitration be first processed through the grievance procedure of the contract. It does not follow, however, that all grievable matters are arbitrable since the grievance clause is much broader than the arbitration clause (Ex. pp. 34-35).

Before the EA's grievance was processed, Sperry pointed out that the situation there involved had occurred only because the Utah plant was not ready on time and that a

recurrence of this particular situation was unlikely. On this consideration—and without prejudice—the EA Grievance Committee agreed to drop the grievance, but subject to ratification by other EA organs. EA's Executive Committee approved but its Representatives Council rejected the withdrawal for reasons unrelated to the issues (R. 16-17).

Sperry submitted affidavits showing that the parties had agreed that, if ratification did not take place, the grievance would be processed through the normal grievance machinery (R. 17). It further pointed out that a grievance session was held thereafter and that the EA amplified the details of its grievance and its demand for relief (R. 17-18). Nevertheless, the EA commenced this proceeding in the District Court before the expiration of Sperry's time to answer under the grievance procedure rules (R. 18). The District Court rejected the evidence adduced by Sperry on its finding that the EA denied in its affidavit the existence of the agreement to conduct the regular grievance processing if ratification did not occur (R. 87-88). While the Court of Appeals concluded that in no event could arbitration be demanded before the grievance processing had taken place, it held that "On this issue the findings of the District Court rejecting Sperry's allegation are fully supported by the record" (R. 97).

On August 21, 1956, the EA demanded arbitration of its charge in the instant proceeding that increases had been granted "on the basis of such employees consenting to being transferred" (R. 12). It filed on September 27, 1956 (R. 1) and the Marshal served on October 1, 1956 (R. 18) a notice of motion which recited that it was made

"pursuant to Section 4 and 6 of the United States Arbitration Act, U. S. C. Title 9" for an order compelling arbitration (R. 2). An answering affidavit was served on October 11, 1956.

The District Court, after receiving the affidavits and hearing oral argument on the motion, as provided in Section 6 of the Arbitration Act, granted the order under the Arbitration Act (R. 84). It held that an arbitrable issue existed as to whether the increases were "transfer bonuses" (R. 90), the determining factor, in its view, being that the demand for arbitration did not call upon the arbitrator for relief precluded by the contract (R. 91). It further reasoned that Sperry had recognized the arbitrability of the issue by permitting the grievance to be processed, although it acknowledged that the scope of the grievance clause was broader than that of the arbitration clause (R. 91).

The Court of Appeals affirmed the judgment of the District Court but it directed arbitration of a different issue than the District Court had, and it did so on entirely different grounds. It relied upon 29 U. S. C. §185(a) to sustain jurisdiction and declined to decide whether the Arbitration Act could apply. It also held that Sperry had waived service of summons by not objecting to its absence in its answering affidavit to the petition under the Arbitration Act (R. 95-6). It further laid down the *general* rule (not argued for Sperry, although the Court so ascribes it) that a party seeking arbitration of an alleged breach of contract must adduce facts (as distinguished from charges) showing the alleged breach (R. 100). The Court did not refer, in its interpretation of the arbitration clause, to the prior negotiations and litigation on the basis of

which Sperry had urged that *under this contract*, a party was required to adduce facts (as distinguished from mere charges) showing the alleged breach. And it expressly rejected the District Court argument that an issue became arbitrable once it had been processed as a grievance (R. 97).

Examining the facts shown in the affidavits, the Court of Appeals held that Sperry properly granted the promotional increases to the 8 employees who had been promoted (R. 100). It further held that the remaining 8 increases were in fact granted for "positions of higher responsibility" (R. 100). It ruled, however, that whether increases granted for higher responsibility constitute "merit" increases is an arbitrable issue (R. 101).

Reasons for Granting the Writ

1. The questions presented are of importance in the administration of Section 301(a) of the Labor Management Relations Act, 1947, 29 U. S. C. §185(a), and of the United States Arbitration Act, 9 U. S. C. §§1, *et seq.*

In *Textile Workers Union* v. *Lincoln Mills of Alabama*, 1 L. ed. 2d 972 (June 3, 1957), decided after the instant proceeding had been commenced, this Court for the first time held that arbitration under a collective agreement may be compelled in a plenary action brought under 29 U. S. C. §185(a). In a companion case in which the Court of Appeals, in a plenary action, had ordered arbitration under the Arbitration Act, this Court declined to affirm under the Federal Arbitration Act but, instead, did so under 29 U. S. C. §185. *General Electric Co.* v. *Local 205*, 1 L. ed. 2d 1028. The dissenting opinion of Mr. Justice

Frankfurter noted that he found "rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective bargaining agreements in the silent treatment given that Act by the Court's opinion" (1 L. ed. 2d at 986). Prior to these two cases, Courts of Appeal in four Circuits had held the Arbitration Act inapplicable to collective agreements. *International Union* v. *Colonial Hardwood Floor Co.*, 4th Cir., 168 F. 2d 33; *Lincoln Mills* v. *Textile Workers Union*, 5th Cir., 230 F. 2d 81, rev'd oth. grds. 1 L. ed. 2d 972; *United Steelworkers of Amer.* v. *Galland Henning Mfg. Co.*, 7th Cir., 241 F. 2d 323, 326-328, rev'd oth. grds. 1 L. ed. 2d 1425; *Mercury Oil Refining Co.* v. *Oil Workers Int. Union*, 10th Cir., 187 F. 2d 980, 983. However, the Second Circuit had held to the contrary in *Signal Stat. Corp.* v. *Local 475*, 2d Cir., 235 F. 2d 298.

The Court below avoided deciding whether its decision in *Signal Stat., supra,* as to applicability of the Arbitration Act to collective agreements, had been overruled *sub silentio* by this Court in the *General Electric* case, *supra.* It did so by holding that Sperry had waived service of summons by filing an answering affidavit to the petition under the Arbitration Act, without protesting the lack of such service. The EA, however, plainly relying upon the authority of the Second Circuit's opinion in the *Signal Stat.* case, *supra,* drew its "Motion" and "Petition" under the Arbitration Act and the District Court issued its order on the same authority.

The notice of motion clearly stated that the application was made "pursuant to Sections 4 and 6 of the United States Arbitration Act, U. S. C. Title 9" (R. 2). The

reference to 29 U. S. C. §185 in the petition* was to satisfy the requirement of 9 U. S. C. §4 that the proceeding be brought in the District Court which would have had jurisdiction of the underlying dispute had there been no arbitration clause, and the EA so explained it in its brief before the District Court (R. 107) and we so understood it in ours (R. 108). There was no occasion to protest lack of personal jurisdiction for a suit under 29 U. S. C. §185(a) since the petition did not found jurisdiction upon 29 U. S. C. §185(a) alone, but upon that statute jointly with 9 U. S. C. §§4, 6, and, under the latter, no summons was required. While 9 U. S. C. §6 provides its own procedural rules and is excluded from the coverage of the Federal Rules of Civil Procedure (Rule 81(a)(3)), the Federal Rules of Civil Procedure do apply to 29 U. S. C. §185(a) so that service of a summons is required (Rules 1 and 4).

Moreover, beyond the matter of the process necessary to commence a plenary action under 29 U. S. C. §185(a), there is the further question of the procedure which must be followed in such a plenary action before a judgment is rendered. For by affirming the order of the District Court under the authority 29 U. S. C. §185(a), the Court of Appeals has here sustained the entry of a final judgment in a plenary action without a trial, and without any opportunity to bring to bear the pre-trial procedures authorized by the Federal Rules of Civil Procedure.

Assuming *arguendo*, as the Court of Appeals determined, that Sperry somehow waived the filing and service of a summons and complaint in a plenary suit under 29 U. S. C.

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* "Jurisdiction of this Court is based on Section 301 of the Labor Management Relations Act, 1947 U. S. C. Title 29, Section 185, and the United States Arbitration Act, U. S. C. Title 9" (R. 3).

§185(a), on what basis does the Court of Appeals proceed to award *judgment* as in a plenary suit? The EA's only motion was specifically designated as being exclusively under the Arbitration Act (R. 2). Sperry's answering and rebuttal affidavits in opposition to the petition and motion could hardly be deemed a waiver of Sperry's procedural rights to trial on the issues raised by the pleadings, and to pre-trial procedures applicable to the plenary action theory of the case.

The Court of Appeals certainly would not have been justified in granting judgment unless it could convert the motion under the Arbitration Act to one for summary judgment in a plenary action. There was, however, an issue of fact as to the agreement to return the grievance to normal grievance machinery processing (R. 17-18) which the District Court could not decide on affidavits. The Court of Appeals held that "the findings of the District Court rejecting Sperry's allegations are fully supported by the record" (R. 97). The District Court, however, purported to make its findings by weighing the conflicting statements in the affidavits. It stated (R. 87-88):

> "The employer's position is essentially that the first 'Answer to Grievance No. 42-56' was in fact no answer, by agreement between the parties permitting the employer to substitute a new answer on the merits in the event of union rejection of the settlement. But such an agreement is denied under oath. The fact that the parties did meet subsequently and discuss the merits does not establish that there was an agreement to waive or extend the contract procedure. . . . In any event, I cannot, on the facts presented in the affidavits, make a finding that there was such an agreement."

The affidavit, submitted by Sperry in the District Court, stated on the personal knowledge of the affiant that (R. 17):

> "The Company filed an answer reflecting this settlement (annexed hereto as Exhibit '2') on the understanding that, should the EA fail to ratify the settlement, the Company would then address itself to the content of the grievance under the grievance procedure."

And also that (R. 70):

> "it had been agreed that, in this eventuality [i.e., failure of ratification], the processing of the grievance with respect to its substance would then occur."

This evidence the District Court rejected on the basis of conflicting affidavits reporting a different version of oral statements. However, to grant summary judgment resolving conflicting testimony as to oral conversations which are not inherently improbable is in conflict with the decisions of the Courts of Appeal in other Circuits. Thus, it has been held that "A litigant has a right to a trial where there is the slightest doubt as to the facts." *Peckham* v. *Ronrico Corp.*, 1st Cir., 171 F. 2d 653, 657. "To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue." *Whitaker* v. *Coleman*, 5th Cir., 115 F. 2d 305, 306. Also: *Walling* v. *Reid*, 8th Cir., 139 F. 2d 318, 322; *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 3rd Cir., 130 F. 2d 1016, 1018; *Dewey* v. *Clark*, D. C. Cir., 180 F. 2d 766, 772.

2. The only arbitrable issue found by the Court of Appeals was whether Sperry could grant a merit increase for higher responsibility (R. 100-101). However, the claim filed as a grievance (R. 41) and the issue as to which arbitration was demanded (R. 12) was only that Sperry had

violated the contract by granting increases "on the basis of such employees consenting to being transferred". Thus, the issue held to be arbitrable had not been processed in the grievance procedure as required by the contract (Ex. pp. 34-36) nor was it included in the demand for arbitration. Moreover, the class of increases held to be questionable by the Court is expressly authorized by the policy statement (R. 80, 75-76) required by the contract (Ex. pp. 29-30).

There are thus presented important questions as to the policy to be followed in compelling arbitration, under this Court's decision in *Textile Workers Union* v. *Lincoln Mills*, *supra*, where the contract makes grievance machinery processing a prerequisite to arbitration and that processing has not taken place. These questions have not previously been determined by this Court but ought to be since they are not only important but they arise under almost every collective bargaining agreement arbitration clause.

3. There is also presented another important question left open by *Textile Workers Union* v. *Lincoln Mills*, *supra*, namely the proper effect to be given to State court decisions interpreting the collective bargaining agreement involved in the proceeding in the federal court. Here, there not only was a prior State court decision interpreting the very clauses here involved but the parties specifically agreed not to change the clauses when the contracts were twice renegotiated thereafter (R. 25-36). The State court had held that Sperry's discretion in granting increases was not reviewable. *Infra*, p. 39. No weight was given to that determination in the Court below. Most arbitration clauses in collective agreements, particularly those now effective, have been written in the light of State law. The effect to be

given that law is an issue of general significance which ought to be speedily resolved to avoid confusion in the administration of 29 U. S. C. §185(a).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EMANUEL L. GORDON
Counsel for Petitioner

February 28, 1958.

APPENDIX A

Opinion of Court of Appeals Before Medina, Hincks and Waterman

WATERMAN, *Circuit Judge*:

Engineers Association (EA), a labor organization representing the non-supervisory professional engineers and technicians employed by Sperry Gyroscope Co. at the latter's plant in Great Neck, New York, proceeded in the District Court to compel Sperry to submit to arbitration in accordance with the terms of a collective bargaining agreement between the parties. The court, after a hearing, granted the relief requested and Sperry appeals. Reversal is sought on the grounds that (1) the District Court lacked jurisdiction, (2) the demand for arbitration was premature because of the failure of the union to exhaust the grievance procedure as required by the contract, and (3) under the terms of the contract the dispute is not arbitrable.

In March 1956, Sperry and EA entered into a collective bargaining agreement governing the terms and conditions of employment of the employees represented by the union. Several months later Sperry began construction of a new plant in Salt Lake City, Utah; and, in connection therewith, requested a number of its employees to transfer to a customer installation unit in Pasadena, California. It was understood that employees consenting to the transfer were to be assigned to the Utah plant when the construction of that plant was completed. There is no indication in the record as to how many employees Sperry approached about this program, but, in any event, twenty-eight employees consented to the transfer. Sixteen of these twenty-eight received an increase in salary. EA alleges that the salary

increases were granted to provide an incentive to transfer to the new plant. Consequently, it contends, the salary increases violated that provision of the collective bargaining agreement which specifies that "Salary increases for individual employees • • • shall be on a merit basis only." Sperry denies that the salary increases were granted for considerations other than merit; and, in addition, asserts that the granting by it of merit increases is not arbitrable under the contract. In support of this assertion it relies upon the recital in the contract that "merit increases are at the sole discretion of the Employer • • • "

EA invoked the jurisdiction of the District Court under "Section 301 of the Labor Management Relations Act, 1947, U. S. C. Title 29, Section 185 and the United States Arbitration Act, U. S. C. Title 9." We need not determine whether jurisdiction might be sustained under the latter act, cf. *Signal-Stat Corp.* v. *Local 475*, 235 F. 2d 298 (2 Cir. 1956), cert. denied, 354 U. S. 911, since it is clear that Section 301 of the Labor Management Relations Act confers power upon the District Courts to compel arbitration in accordance with the terms of a collective bargaining agreement. *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957).

Sperry urges, however, that the present proceeding was commenced by Petition and Notice of Motion, a procedure it claims is authorized only by the Federal Arbitration Act. Hence, it contends, the present proceeding was not a suit commenced under Section 301, and *Lincoln Mills* is, therefore, not dispositive of the jurisdictional issues presented on this appeal. We may assume, without so deciding, that Sperry is correct in its contention that proceedings under

Section 301 must be commenced by the filing of a complaint and the service of a summons. Nevertheless, the petition clearly invoked the jurisdiction of the District Court under Section 301. Sperry failed to object to the manner in which the proceeding had been commenced; and within twenty days following service upon it of the Petition and Notice of Motion filed its answer, denying that an arbitrable dispute existed and alleging that EA's demand for arbitration was premature. The answer did not state that there had been any impropriety in commencing the proceeding by petition. The failure to do so is a waiver by Sperry and it is precluded from asserting this contention at this time. See Rule 12(h), Fed. Rules Civ. Proc.

A clause of the collective bargaining agreement at issue here requires as a condition precedent to arbitration that the grievance procedure elsewhere provided for in the contract be exhausted prior to a demand for arbitration.[1] In compliance with this requirement EA filed a grievance[2]

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[1] Immediately following that portion of the contract setting forth the grievance procedure, the contract provides:

"F. Arbitration

"1. Unless otherwise provided elsewhere in this Agreement, all disputes, differences or grievances arising out of the interpretation or application of the provisions of this Agreement that shall not have been satisfactorily settled within two weeks following the procedure hereinabove set forth shall, at the request of either party, be promptly submitted to arbitration."

[2] A dispute such as the present one is termed by the contract an "Association-Employer Grievance." The procedure for dealing with such disputes is set forth in Article 20 of the contract which provides, in pertinent part:

"B. Association-Employer Grievances

"1. All disputes, differences or grievances that may arise between the Association and the Employer, or between the

with Sperry and therein stated its objections to the salary increases that are the basis of the present dispute. The employer denied the charges made by the union. During the next several months the parties discussed the subject matter of the grievance and exchanged correspondence. These negotiations failed to result in a settlement of the grievance. Finally EA notified Sperry of its intention to submit the dispute to arbitration, and, upon the latter's failure to comply with the demand, initiated the within proceeding. The District Court found that each step of the grievance procedure provided for in the contract had been completed. Sperry alleged that there had been an agreement between the parties to modify the prescribed grievance procedure so that Sperry might file a supplemental answer to EA's claim. On this issue the findings of the District Court rejecting Sperry's allegation are fully supported by the record.

The principal issue on this appeal is whether the dispute between the parties that caused EA to file its grievance is an arbitrable dispute under the language of the collective

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Employer and the Association, shall be taken up between the Association Grievance Committee and the Vice Presidents for Operations and for Industrial Relations, or their duly designated representative or representatives. Subsequent handling of such disputes, differences, and grievances shall be in accordance with the provisions of paragraphs (b) and (c) of Part A above."

The pertinent portion of paragraph (b) states that "The Employer shall notify the Association in writing within two weeks after this meeting of its decision" and paragraph (c) provides that "In the event that the Association does not accept the Employer's answer, it shall, within two weeks after the receipt thereof, notify the Employer of its intention to submit the same for arbitration."

bargaining agreement. Merely because the dispute was "grievable," it does not necessarily follow that it was also arbitrable. The grievance procedure established by the contract covers a wider range of controversies than the arbitration clause. The former extends to "all disputes, differences or grievances that may arise between the Association and the Employer • • • " The latter clause is more limited. It provides for the submission to arbitration of "all disputes, differences, or grievances arising out of the interpretation or application of the provisions of this agreement • • • " Hence Sperry contends that since, under the contract, the granting of merit increases is a matter within its sole discretion, the union's grievance does not give rise to an arbitrable dispute. EA replies, and we think correctly, that this contention begs the question. EA contends that even if *merit* increases are at the sole discretion of the employer, the issue here is whether the salary increases were in fact granted for merit, or whether in fact they were granted as an incentive for employees to transfer to the Utah plant. If the increases were granted on the latter basis they were increases that were prohibited by the collective bargaining agreement. A determination of their true nature is properly arbitrable under the contract.

EA argues that although merit increases are at the sole discretion of the employer, the present dispute concerns the interpretation of the phrase "on a merit basis only" as that phrase applies to the particular increases objected to. Hence, it concludes, the dispute "arises out of the interpretation or application" of the agreement, and is, therefore, arbitrable. In reply, Sperry asserts that under the contract it retains the right to grant merit increases, and

that such increases are not reviewable by an arbitrator. It urges that the union should not be permitted to obtain a review of such increases merely by the device of attaching a foreign label to them, *i.e.*, by calling them "transfer increases," for if EA were permitted to create an arbitrable dispute merely by asserting that salary increases have been granted on the basis of considerations other than merit, the purpose underlying the "sole discretion" clause would be largely nullified. Sperry argues that it has bargained not merely for the right to grant merit increases, but also for the right to do so without being called before an arbitrator whenever EA disagrees with the increases granted. Consequently, Sperry contends, the court should not compel arbitration unless EA produces evidence which tends to justify its assertion that the salary increases were not granted for merit, and were granted for other reasons. Since, in Sperry's view, the union has failed to produce such evidence, the grievance does not give rise to an arbitrable dispute.

Proceedings under Section 301 are governed by federal law, *Textile Workers Union* v. *Lincoln Mills, supra.* The section does not contain any guides for decision, and therefore, limited only by the policy of our national labor laws, we must fashion the applicable rules from other sources. "State law, if compatible with the purposes of Section 301 may be resorted to in order to find the rule that will best effectuate the federal policy." *Lincoln Mills, supra,* at 457. Also, we may look to the Federal Arbitration Act which, though not binding upon us in suits brought under Section 301, *General Electric Co.* v. *Local 205,* 353 U. S. 547 (1957),

does provide a "guiding analogy." *Textile Workers* v. *American Thread Co.*, 113 F. Supp. 137 (D. C. Mass. 1953).

Under New York law, the law which would govern this dispute were it not for the power granted the federal courts by Section 301, arbitration will not be compelled unless the party demanding it introduces evidence of the existence of an arbitrable dispute. *General Electric Co.* v. *United Electrical Radio and Machine Workers*, 300 N. Y. 252, 90 N. E. 2d 181 (1949); *Application of Berger*, 78 N. Y. S. 2d 528 (Sup. Ct. 1948). The difficulty in the present case, as the court below recognized, is that a determination of the arbitrability of the grievance depends upon the same facts relevant to a decision by an arbitrator upon the merits of the grievance. If the wage increases granted by Sperry were "on a merit basis only," then Sperry has not only not violated the contract, but the present dispute is not arbitrable. If, on the other hand, the increases were granted on the basis of considerations other than merit, Sperry has violated the contract and the dispute is arbitrable. But, merely because there is an identity of issues in the two proceedings, the court is not relieved of its duty to determine whether an arbitrable dispute exists. In construing the provisions of the Federal Arbitration Act, we have stated that after determining that the parties have entered into an arbitration agreement, the duty of the court is to determine "whether any of the issues raised in the suit were within the reach of that agreement." *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978 (2 Cir. 1942). This duty cannot be adequately performed unless the court examines the facts upon which the demand for arbitration is based as those facts relate to the language of the agreement.

See *Industrial Tinder Union* v. *Woonsocket Dyeing Co.*, 122 F. Supp. 872 (D. C. R. I. 1954). To make out a case for arbitration, Sperry's alleged breach must be "put in issue by facts, as distinguished from unsupported charges * * *" *Application of Berger, supra*, at 532; *General Electric Co.* v. *United Electrical Radio and Machine Workers, supra.*

It should be observed, however, that even in a case such as the present one, where the same facts are determinative of both arbitrability and the merits of the controversy, an order compelling the parties to submit to arbitration does not impinge upon the power of the arbitrator to decide the merits of the dispute. The difference between the two proceedings is in the quantum of proof necessary for the moving party to obtain relief. In the arbitration hearing, the party seeking relief must fully establish his claim that the opposing party has violated the contract. Determination of arbitrability only requires that the moving party produce evidence which tends to establish his claim. Once the tendency of the evidence to support the claim has been established, it is then the function of the arbitrator to weigh all the evidence and to then determine whether the contract was broken.

An examination of the record indicates that EA has introduced evidence which tends to support its claim that the parties are engaged in a dispute that is arbitrable under the contract. Sixteen of the twenty-eight employees consenting to transfer to the Utah plant received salary increases. Eight of these sixteen were promoted to a higher classification. Sperry asserts, and EA does not deny, that salary increases accompanying promotion to a higher clas-

sification have always been treated as merit increases. But, the other eight employees who received salary increases were not promoted; they were merely given positions of higher responsibility. EA contends that salary increases granted under these circumstances are not granted on "a merit basis only." This contention gives rise to a substantial problem in the interpretation of the agreement. EA is entitled to have an arbitrator determine whether it is correct in its contention or whether the sole discretion retained by Sperry in connection with the granting of merit increases permits the latter to grant increases to employees assuming positions of higher responsibility.

The record also reveals that each of the sixteen employees who received salary increases immediately received those increases, even though their promotions or their assumptions of higher responsibility were not effective until they transferred to Utah, transfers which apparently have not occurred yet. Without passing upon the weight to be given this evidence, we think that EA may legitimately argue that the timing of the increases gives rise to a likely inference that the purpose of the increases was to provide an incentive to transfer and not to compensate for meritorious performance of duty.

We conclude that EA has established the existence of an arbitrable dispute. Whether it is correct in contending that the salary increases were granted for considerations other than merit is a question which the parties have agreed to submit to an arbitrator, and the court below properly ordered such a submission.

Affirmed.

Opinion of District Court

EDELSTEIN, *D.J.*:

The petitioner, a labor union, seeks to compel the respondent employer to arbitrate a controversy under the terms of an arbitration clause contained in the collective bargaining agreement between the parties. The employer operates a plant in New York and, upon opening a plant in Utah, offered some of the New York employees transfers to Utah. It appears that some of the employees consenting to the transfer were given increases. The collective bargaining agreement, after setting forth salary rates, provides that they may be increased "on a merit basis only", and further recites that merit increases are at the sole discretion of the employer. The employer maintains that the increases involved were merit increases, but the union contends that they were transfer bonuses, not subject to the unilateral action of the employer. The contract provides for the arbitration of "all disputes, differences or grievances arising out of the interpretation or application of the provisions of this Agreement * * *."

The jurisdiction of this court is invoked under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, and Sections 4 and 6 of the United States Arbitration Act, 9 U.S.C. §1 *et seq.* The respondent, conceding division of authority among Courts of Appeal, takes the position that the court lacks jurisdiction. However, in this Circuit, at least, it is established that Section 301, which authorizes the bringing of suit in a district court for the violation of a contract between an employer

and a labor organization, without regard to the amount in controversy or the citizenship of the parties, created "a generally applicable and uniform federal substantive right" as well as "a remedy and a forum in which to enforce it." *Shirley-Herman Co.* v. *International Hod Carriers*, (2 Cir.) 182 F. 2d 806, 809; *Signal-Stat Corporation* v. *Local 475, etc.*, (2 Cir.) 235 F. 2d 298. A number of district courts, including the Southern District of New York, have held that Section 301 itself authorizes decrees of specific performance of arbitration agreements. *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137; *Wilson Bros.* v. *Textile Workers Union*, 132 F. Supp. 163; *Local 207, Elec. etc.* v. *Landers, Frary & Clark*, 119 F. Supp. 877; *Evening Star Newspaper Co.* v. *Columbia Typographical Union*, 124 F. Supp. 322; *Insurance Agents' International Union* v. *Prudential Ins. Co.*, 122 F. Supp. 869. But see *Local 205, etc.* v. *General Electric Company*, (1 Cir.) 233 F. 2d 85, 96. In any event, inasmuch as federal law is applicable under Section 301, for remedy as well as substance, the United States Arbitration Act may provide the remedy of specific performance.

But "the remedy of an original action for specific performance under §4 is available only as to an arbitration agreement contained in the types of contracts defined by §2 as qualified by §1." *Local 205, etc.* v. *General Electric Company, supra*, 233 F. 2d at page 97. Section 2 defines as valid and enforceable "a contract evidencing a transaction involving commerce" to settle a dispute by arbitration. And Section 1 excludes application of the act to "contracts of employment of seamen, railroad em-

ployees, or any other class of workers engaged in foreign or interstate commerce." The collective bargaining agreement in this case is a "contract evidencing a transaction involving commerce" within the meaning of Section 2 of the Act. *Signal-Stat Corporation* v. *Local 475, etc.* (2 Cir.) 235 F. 2d 298; *Local 205, etc.* v. *General Electric Company,* (1 Cir.) 233 F. 2d 85; and see *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 108, 200-201. And the Court of Appeals for the Second Circuit has indicated, in *Signal-Stat Corporation* v. *Local 475, supra,* its agreement with the Third Circuit's decision and reasoning in *Tenny Engineering, Inc.* v. *United Electric, Radio & Machine Workers,* 207 F. 2d 450, that "even assuming a collective bargaining agreement is a 'contract of employment'—the exclusionary clause in Section 1 applies only to 'workers engaged in • • • interstate commerce', *i.e.*, only those actually in the transportation industries." 235 F. 2d at page 302. The workers involved in this case are not in a transportation industry. Accordingly, the United States Arbitration Act is properly applicable.

Nor is jurisdiction to compel arbitration withdrawn by the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq.* The case of *Alcoa S.S. Co.* v. *McMahon,* (2 Cir.) 173 F. 2d 567, cert. den. 338 U. S. 821, is inapposite. There it was held that the Norris-LaGuardia Act precluded the issuance of an order compelling a union to carry out the contract of employment, in compliance with the declaratory judgment interpreting the collective labor agreement. The situation in that case giving rise to a demand for an injunction is precisely the type of situation at which the Norris-LaGuardia Act was aimed; an order upon the union

would have been classic labor injunction, "typically an order which prohibits or restricts unilateral coercive conduct of either party to a labor dispute." *Local 205, etc.* v. *General Electric Company, supra,* 233 F. 2d at page 91. "The general structure, detailed provisions, declared purposes, and legislative history of that statute show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made." *Textile Workers Union* v. *American Thread Co., supra,* 113 F. Supp. at page 142. On the contrary, a policy of the Norris-LaGuardia Act to foster arbitration of disputes between employers and unions is effectuated by a decree of specific performance of a voluntary arbitration agreement. *Wilson Brothers* v. *Textile Workers Union, supra,* 132 F. Supp. at pages 165-166.

Under Section 4 of the Arbitration Act, the court in an action to compel arbitration considers no issues (except for equity considerations) other than (1) the making of an agreement to arbitrate, and (2) the failure, neglect or refusal of the other party to perform that agreement. There is no dispute over the making of the agreement to arbitrate. But the employer denies his liability to arbitrate under that agreement because (1) the demand for arbitration is premature and (2) there is no arbitrable issue.

Under the collective labor agreement, a grievance may not come to arbitration until the specified grievance procedure has been carried out. That procedure entails (for an "Association-Employer Grievance" as here involved)

a grievance session between the union's grievance committee and the employer's representatives in operations and industrial relations. After that session, the employer has two weeks in which to notify the union of its decision in writing. In the event that the union does not accept that answer it must, if it desires to arbitrate, notify the employer within two weeks of its intention to submit the issue for arbitration. The union filed a written grievance with the company and the parties met to take up the grievance. But it is alleged that, because only a small number of persons were involved and the situation appeared to be a non-recurring one, the grievance committee and the employer's representatives agreed to settle the issue without going into the substance or merits of the grievance. An "Answer to Grievance No. 42-56" was served on the union, embodying the settlement, but the settlement by the grievance committee was subject to further approval by the union. The union ultimately declined to ratify the settlement, and made a demand for arbitration.

This procedure would seem to be in conformity with the prescribed procedure preliminary to arbitration. However, the employer maintains that there had been an agreement that, should the settlement be rejected, the company had the right to file a new answer directed to the merits, which would be processed through the grievance procedure. The parties did meet on the grievance subsequently, at which time the union agreed to furnish the names of the persons involved and agreed to state in writing the relief it sought. The list of names was submitted, and

separately, marked "Addendum II to Grievance #42-56", a statement was furnished setting forth the relief sought. There were subsequently a letter from the company to the union seeking clarification of the relief sought and a union reply to that letter. On October 1, 1956 the company filed another "Answer to Grievance No. 42-56". But the petition in this case was verified four days before that answer was filed with the union and was received at the company corporate offices on the same day that the company's answer was filed at the plant. Consequently, it is argued, at the time this proceeding commenced, the grievance procedure had not yet been completed. Moreover, the employer argues that its right was not merely the formal one of filing an answer, but of having it considered in good faith by the union, which it could not have done, in the circumstances.

The employer's position is essentially that the first "Answer to Grievance No. 42-56" was in fact no answer, by agreement between the parties permitting the employer to substitute a new answer on the merits in the event of union rejection of the settlement. But such an agreement is denied under oath. The fact that the parties did meet subsequently and discuss the merits does not establish that there was an agreement to waive or extend the contract procedure. It is set forth, without contradiction, that at subsequent meetings the employer's representatives addressed themselves to the arbitration demand already served and declared their unwillingness to arbitrate, without reference to a new answer or a new arbitration demand. Moreover, in the letter responding to the company's request for clarification of the relief demanded,

the union asked that the company proceed without delay in the selection of an arbitrator. Such a request is inconsistent with the existence of the agreement alleged. In any event, I cannot, on the facts presented in the affidavits, make a finding that there was such an agreement. It is, of course, the ideal function of the grievance procedure in a collective labor agreement to explore the merits of grievances with a view to amicable disposition on the basis of mutually understood facts. But it is hardly alien to the funtion of a grievance procedure to settle disputes in some other way, as was attempted here. The fact that the substance of the grievance was not aired is no doubt unfortunate, but the grievance machinery of the contract is one of procedure; if the procedure is exhausted, the company may not be heard to complain that the procedure did not embrace the merits of the complaint. Otherwise, a step would be added to the grievance procedure not specified in the contract. Except for the time limitations which, it is alleged without contradiction, were extended by both sides, the contract procedure was followed and the demand for arbitration was not premature.

The employer's position on the arbitrability of the dispute is that on the basis of prior negotiations and litigation between the parties, it is established that they contracted in view of New York law that only bona fide disputes would be arbitrable. *General Electric Co.* v. *United Electrical Radio & Machine Workers of America, C.I.O.*, 300 N. Y. 262; *Taft* v. *Sperry Gyroscope Co.*, 127 N. Y. S. 2d 61. The dispute, it is alleged, actually involves the union's desire to arbitrate a grievance that merit increases had been improperly withheld from certain employees. But

inasmuch as that claim is not arbitrable, or even properly the subject of a grievance, under the clause in the contract giving to the company sole discretion in the matter of merit increases, the union instead filed a grievance about the granting of such increases to others (who were leaving the bargaining unit anyway), thereby (1) using the grievance for "propaganda" purposes pursuant to a long standing attempt to alter the sole discretion clause, and (2) hoping to apply pressure on the company in favor of those who had not received merit increases. Accordingly, the company has set forth facts in connection with the granting of the increases to the employees in question, and argues that it is the burden of the union to meet the challenge by persuading the court that there is a bona fide basis for the claim; if the court concludes that the agreement has not been violated there can be no arbitration.

In the General Electric case, supra, 200 N. Y. at page 264, the New York law is stated: "If, under the unambiguous terms of an agreement calling for arbitration, there has been no default, the court may not make an order compelling a party to proceed to arbitration. • • • Whether or not a bona fide dispute exists is a question of law • • •." In that case, under the guise of a claim that the company was violating the anti-discrimination provision of the collective bargaining agreement by failure to afford pension credits for time spent in union activities beyond those hours for which the company had agreed to pay, the union sought arbitration. But the court found that the company was not obliged under the contract to give pension credits for time spent in union activity beyond a maximum number of hours per week.

for which the company had agreed to pay, and there was no arbitrable issue, even though the alleged dispute fell within the literal language of the arbitration agreement. And in *Taft* v. *Sperry Gyroscope Co., supra,* 127 N. Y. S. 2d 61, involving the parties at bar in the instant case, the court found that although the issue for arbitration was ostensibly that the company granted merit increases for reasons other than merit, the real issue, on the basis of the relief demanded, was the arbitration of wage schedules, clearly beyond the arbitral machinery.

These cases are authority for nothing more than the proposition that arbitration may not be compelled on an issue not arbitrable under the contract, and arbitrability may not be conferred by the mere device of a label. The contract between the parties provides that the employer may, at its sole discretion, grant increases "on a merit basis only". The union contests certain increases as not being on a merit basis only, but as being, at least in part, transfer bonuses. The employer insists, with supporting allegations of fact, that the increases were on a merit basis only and not subject to arbitration by being labeled with another name. But the determination of whether the label attached by the union is inaccurate involves, in this case, a determination of disputed fact, in anticipation of the arbitration itself, and a begging of the entire question. The determination of arbitrability, that is, whether there has been a violation of contract by the company, or a default of arbitration, must be one of law. It must be found that the issue raised is in reality outside the scope of the contract, as appears from a consideration

of the true nature of the claim against the terms of the agreement. In prior litigation between the parties, it has been noted that "in appropriate circumstances an arbitrable dispute may exist upon a claim that increases are granted or withheld upon grounds and causes other than merit in violation of the spirit and purpose of the agreement." *Taft* v. *Sperry Gyroscope Co., supra,* 127 N. Y. S. 2d at page 62. It would appear that the appropriate circumstances exist at this time. The issue sought to be arbitrated is whether the increases given were on a merit basis only and this issue is certainly, in the terms of the contract, a dispute "arising out of the interpretation or application of the provisions" of the agreement. There is a direct challenge that certain increases were not merit increases and the decision of the arbitrator will be that they were or were not, with no implication of extraneous or collateral issues involving the general wage schedule, or the granting or withholding of increases or the amount of any increase. There is no basis as a matter of law for a determination that an extraneous issue is being subjected to arbitration by the application of a label. The union motive for seeking arbitration, if the issue is arbitrable, may not be tried in the judicial forum, no matter how significant it may be in the arena of labor-management relations.

Moreover, it would seem that the employer itself considered the issue to be arbitrable, inasmuch as it participated, apparently without objection, in the processing of the dispute through the grievance machinery. Cf. *Signal-Stat Corporation* v. *Local 475, etc.,* (2 Cir.) 235 F. 2d 298. In-

deed, in arguing the prematurity of the arbitration demand submitted before the merits of the grievance were explored, the employer insists that the grievance procedure was designed precisely to bring out the kind of facts available in this instance to avoid misunderstanding based upon preconceptions and lack of information. If the dispute is one referable to the grievance machinery, it is not one within the sole discretion of the employer. While not all "grievable" disputes are arbitrable under the contract, this one is, for it involves a difference arising out of the interpretation or application of the provision in the contract authorizing the employer to make increases on a merit basis only.

Accordingly, the application to compel arbitration will be granted.

Dated: February 5th, 1957.

DAVID N. EDELSTEIN
United States District Judge

Judgment entered Feb. 5, 1957.
HERBERT A. CHARLSON
Clerk

APPENDIX B

Opinion of New York Supreme Court, 131 N. Y. L. J. 6, Matter of Taft (Sperry Gyroscope Co.)

SCHREIBER, *J.*:

Motion to stay arbitration is granted. Petitioner seeks to arbitrate the question of whether the company has violated the provisions of the agreement by granting general wage increases in the guise of merit increases. Only a bona fide dispute is arbitrable (*Matter of General Electric Co.*, 300 N. Y. 262; *Albert* v. *Admiration Knitwear Co.*, 304 N. Y. 1). There is nothing in the contract which limits wage increases to employees. As to employees in the Class II classification, the contract provides for a minimum and maximum rate, while as to Class I there is only provision for a minimum rate. There is no claim that the company has violated the minimum and maximum provisions of the agreement. Again, apart from a general contention, petitioner has not indicated even one case where it claims the increase granted was not based upon merit. The charge that there was a "general" increase is wholly unsupported by any proof whatever. The company, on the other hand, has demonstrated that there was no "general" increase and that the merit review procedure was followed in granting increases. Moreover, the agreement provides that "merit increases are at the sole discretion of the Employer". That discretion is not reviewable (*Application of Western Electric Co., Inc.*, 277 App. Div., 858, aff'd 301 N. Y. 727). Consequently, I find no bona fide dispute here which is arbitrable under the agreement. Settle order.